Supreme Court, U.S.
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No. 99-1641

IN THE

SUPREME COURT OF THE UNITED STATES

US WEST COMMUNICATIONS, INC.,

Petitioner,

v.

MFS INTELENET, INC., ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT WASHINGTON UTILITIES & TRANSPORTATION COMMISSION'S BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner US West Communications, Inc. ("US West") urges this Court to grant its Petition for a Writ of Certiorari, arguing that there is a conflict between two United States Courts of Appeals regarding the applicability of the Hobbs Act, 28 U.S.C. §§ 2342, *et seq.*, to rules promulgated by the Federal Communications Commission ("FCC"). This case has little if anything to do with the Hobbs Act and dueling federal court jurisdiction. Rather, it involves a straightforward implementation of the pro-competitive policies of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, *et seq.* ("1996 Act"), by the Washington Utilities and Transportation Commission ("WUTC"). State commissions, such as the WUTC, are charged by the 1996 Act to effect the obligation of incumbent companies, like US West, to interconnect their facilities with new competitors in the local telecommunications market, like MFS Intelenet, Inc. ("MFS"). The Court should deny the Petition.

STATEMENT

A. The Requirement for Interconnection Among Telecommunications Companies Under the Telecommunications Act of 1996

This case arose out of the procedure under the 1996 Act by which incumbent local exchange telecommunications companies (incumbent companies), such as US West, are required to enter into "interconnection agreements" with their competitors, such as MFS.[1] The 1996 Act requires incumbents to enter into interconnection agreements with their competitors under which competitors may acquire

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[1]The purpose of the Telecommunications Act of 1996 is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996); *see AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-72 (1999).

access to elements of the incumbents' telecommunications networks so they can compete with the incumbents in the local telecommunications market. 47 U.S.C. § 251(c)(3).

These interconnection agreements must contain the particular terms and conditions necessary for the incumbents to fulfill their statutory duties. *Id.* § 251(c)(1). Congress assigned to state public utility commissions, like the WUTC, the primary role in implementing the interconnection agreements. For example, though the incumbent company and the competitors are required to negotiate interconnection agreements in good faith, *id.*, if the parties are unable to resolve all issues through negotiation, a party to the negotiation may request the state commission to arbitrate the open issues. *Id.* § 252(b)(1).[2]

In addition to their role as arbitrators under the 1996 Act, state commissions must approve all interconnection agreements, regardless of whether the agreements are reached through negotiation or arbitration. *Id.* § 252(e)(1). However, the statutory criteria the state commission must apply in its review of an agreement differ depending on whether the agreement, or portion of the agreement, was reached by negotiation or arbitration. Regarding negotiated agreements, a state commission may reject such an agreement, "or any portion thereof," only if the agreement or provision discriminates against a carrier not a party to the agreement or if the agreement or provision is not consistent with the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A). On the other hand, if the agreement or provision was arbitrated, the state commission has somewhat wider latitude. In that situation, the state commission may reject the agreement or provision only if "it finds that the agreement does not meet the requirements of section 251 [of

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[2]The WUTC is authorized by the Washington state legislature to take actions, conduct proceedings, and enter orders as permitted or contemplated for state commissions under the 1996 Act. Wash. Rev. Code § 80.36.610(1).

the 1996 Act], including the regulations prescribed by the Commission [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section." *Id.* § 252(e)(2)(B). The 1996 Act also preserved the authority of a state commission to establish or enforce "other requirements of State law in its review of an agreement . . . ." *Id.* § 252(e)(3).[3]

The 1996 Act specifically preempted state court review of a state commission action, *id.* § 252(e)(4), and assigned the task of judicial review of state commission decisions to the United States District Court. *Id.* § 252(e)(6) ("[A]ny party aggrieved by such [state commission] determination may bring an action in an appropriate Federal district court to determine whether the agreement or

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[3]In 1985, the Washington state legislature passed the Regulatory Flexibility Act, Laws of 1985, ch. 450, p. 1976, codified at several places in Title 80 Wash. Rev. Code, which authorized easy registration of telecommunications companies seeking to operate in Washington. It further set forth a specific process by which companies may seek classification as a competitive company or seek to have one or more services designated "competitive," Wash. Rev. Code §§ 80.36.320, .330, and declared the state policy to promote diversity of supply for telecommunications services. *Id.* § 80.36.300(5).

In 1994, the Washington Supreme Court removed a historical barrier to local telephone competition by rejecting arguments that exclusive franchise service areas in the telecommunications industry were the law in Washington. *Electric Lightwave, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 530, 869 P.2d 1045 (1994). The court recognized that granting monopolies would run counter to state legislative policy promoting competition. *Id.* at 538-39 (citing Wash. Rev. Code § 80.36.300(5)).

Foreshadowing the 1996 Act, in order to foster emerging local competition, the WUTC entered an order setting forth the terms and conditions under which competitors for local exchange service will interconnect their networks with incumbents. *WUTC v. US West Communications, Inc., et al.*, Consolidated Docket Nos. UT-941464, -941465, -950146, -950265, 1995 WL 735315 (WUTC Oct. 31, 1995) (petition for judicial review stayed, King County Superior Court, No. 96-2-08435-2SEA). In this order, the WUTC determined that the transition to competitive markets would be accomplished largely through access to unbundled network elements and resale of services. *Id.* at *40-41. Therefore, the WUTC exercises its role to effect the pro-competitive policies, both under the 1996 Act and under pre-existing state law.

statement meets the requirements of section 251 and this section.").

This case is the result of a challenge by US West to the WUTC's approval of the interconnection agreement between US West and MFS, negotiated in part and arbitrated in part, and the subsequent review of that approval in the district court. Though the challenge was broad-based, the issue presented to this Court involves the relationship and status of certain FCC rules to the agreement and the lower court decisions affirming the WUTC.

B. The FCC's Local Competition Rules and the *Iowa Utilities Board* Litigation Before the Eighth Circuit and This Court

In approving an arbitrated agreement, the state commission must determine if it conforms with FCC rules. 47 U.S.C. § 252(e)(2)(B).[4] Following the passage of the 1996 Act, the FCC promulgated regulations to implement the local competition provisions of the Act, including those relating to interconnection. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("Local Competition Order"). These regulations specified which telecommunications "network elements" an incumbent must make available to its competitors. A network element is a facility or equipment used in the provision of a telecommunications service. 47 U.S.C. § 153(29). For example, a "switch" routes the call and is connected to the local "loop," which runs from a customer's place of use to the switch.[5] Under the Act, these

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[4]However, with regard to agreements, or portions of agreements, that are adopted by negotiation, the state commission need not so apply FCC rules. Rather, in such cases, the state commission may reject the agreement, or portion thereof, only if it determines that it is not consistent with the public interest. 47 U.S.C. § 252(e)(2)(A).

[5]Simply speaking a "switch" is "a mechanical, electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or

elements must be "unbundled" and provided to competitors "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3).

In these rules, the FCC imposed at least three separate provisioning requirements. First, it required incumbents to provide unbundled network elements in a manner that would allow competitors to combine the elements in order to provide a finished service, 47 C.F.R. § 51.315(a) ("finished service rule"). Second, it prohibited incumbents from separating already-combined network elements, unless otherwise requested by competitors. *Id.* § 51.315(b) ("no separation rule"). Finally, the FCC required incumbents to combine network elements at the request of competitors. *Id.* § 51.315(c)-(f) ("mandatory combination rule"). It is the mandatory combination rule that is the focus of US West's argument.

Numerous parties, including US West, petitioned for judicial review of the Local Competition Order. These cases were consolidated in the Eighth Circuit Court of Appeals. On September 27, 1996, the Eighth Circuit temporarily stayed the entire body of the FCC's rules. *Iowa Utils. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996). Ultimately, the Eighth Circuit stayed only selected rules but left the finished service, no separation, and mandatory combination rules intact. *Id.* at 427 & n.8.[6]

In its review of the FCC's rules, the Eighth Circuit vacated the mandatory combination rule, 47 C.F.R. §

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selects paths or circuits." NEWTON'S TELECOM DICTIONARY, 757 (15th ed. 1999). The "local loop" is the physical connection from the customer's premises to the local exchange company's central office. *Id.* at 465.

[6]The Eighth Circuit stayed the FCC's rules establishing pricing guidelines for state commissions and the so-called "pick and choose" rules by which the FCC allowed competitors to incorporate selective portions of interconnection agreements between the incumbent and other competitors into their own agreements with the incumbent. *Iowa Utils. Bd.*, 109 F.3d at 421.

51.315(c)-(f). *Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997). On rehearing, the Eighth Circuit also vacated Rule 315(b), the no separation rule. *Id.* The court vacated these rules for two reasons. First, it held that the 1996 Act could not be read to require incumbents to combine elements. Second, it compared the provisions in the 1996 Act that established how an incumbent company would be compensated for unbundled elements and finished services. *Iowa Utils. Bd.*, 120 F.3d at 813. Under the 1996 Act, incumbents must provide unbundled elements at cost-based rates, and finished services at retail prices less a wholesale discount. *Id.; see also* 47 U.S.C. § 252(d)(1), (3). The court opined that requiring access to combined elements at cost-based rates for unbundled access would "obliterate" the pricing distinctions between these two means by which competitors could use the incumbent's network to provide competitive service. *Iowa Utils. Bd.*, 120 F.3d at 813. However, the Eighth Circuit affirmed the FCC's determination that competitors may obtain the ability to provide finished services entirely through access to unbundled network elements as "consistent with the plain meaning and structure of the Act." *Id.* at 815; *see also* 47 U.S.C. § 251(c)(3); 47 C.F.R. § 51.315(a).

On January 25, 1999, this Court affirmed in part and reversed in part the Eighth Circuit's decision. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). With respect to the FCC's no separation rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act and reinstated that rule. *Iowa Utils. Bd.*, 525 U.S. at 393-95. The Court rejected the argument that the Act requires competitors to combine network elements for themselves. The Court remanded the case to the Eighth Circuit for "proceedings consistent with" the opinion. *Id.* at 397.

However, this Court did not rule on the mandatory combination provision in *Iowa Utilities Board*. On remand, the Eighth Circuit has heard arguments on whether it should

reexamine its earlier holding of whether the mandatory combination rule is invalid. *See* Pet. App. 114a. That forum is the appropriate one, in the first instance, to make the determination.[7] In any event, for the purposes of this Petition, we can assume that, at least for the near future, the mandatory combination rule is not in force.

C. Proceedings Below

1. Negotiations Between the Parties and Arbitration of Unresolved Issues Before the WUTC

On February 8, 1996, MFS requested negotiations with US West for interconnection under the Act. On June 24, 1996, MFS filed a petition with the WUTC requesting arbitration of unresolved issues pursuant to 47 U.S.C. § 252(b)(1). Pet. App. 40a.

The WUTC adopted "final offer" arbitration, whereby the arbitrator resolved the disputed issues between US West and MFS by selecting between the parties' last proposals as to each unresolved issue, selecting the proposal that was the most consistent with the requirements of the Act, state law and WUTC policy. Pet. App. 41a. Under this method of arbitration, the parties have the incentive to approach a middle ground. If neither party submitted a final offer that complied with applicable law or policy, the arbitrator would resolve the disputed issue in a manner to assure such compliance. Only the disputed issues were before the arbitrator for decision. Pet. App. 41a-42a. Negotiated issues

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[7]Before the Ninth Circuit, US West argued that in the *Iowa Utilities Board* litigation no party appealed the Eighth Circuit's invalidation of the mandatory combination rule, so, for the purposes of this litigation, it is presumed invalid. US West's Pet. for Reh'g and Pet. for Reh'g En Banc, at 5. MFS disagreed, arguing before the Ninth Circuit that the mandatory combination rule was presented to the Supreme Court, but this Court did not rule on it. MFS' Resp. Pet. for Reh'g and Pet. for Reh'g En Banc, at 5 n.2. However, that debate is irrelevant to the issues presented in this Petition.

were not subject to arbitration, but were subject to WUTC approval. 47 U.S.C. § 252(e)(1).

Among the issues negotiated by the parties was the provision regarding combination of network elements that is at issue in this Petition. In that provision, US West and MFS agreed that US West would combine network elements for MFS and MFS would pay for that service.[8] Because the 1996 Act permits state commissions to arbitrate only unresolved issues, this provision was not before the arbitrator for resolution or modification. 47 U.S.C. § 252(b)(1), (4)(a). However, in addition to this negotiated provision, US West proposed the following language to limit the network configuration responsibilities it volunteered to undertake on behalf of MFS: "USWC [US West] will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS." App. 6a; Pet. App. 55a. US West based this proposal on its belief that the Act did not permit competitive companies to provide a finished service by combining network elements

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[8]That provision states:

> "USWC [US West] will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the [sic] MFS own. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. *USWC agrees to perform and MFS agrees to pay for the functions necessary to combine the requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS.* However, USWC need not combine elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they typically are combined." App. 8a-9a (emphasis added).

The agreement, as approved by the WUTC, contains this negotiated provision. App. 2a-3a.

purchased from incumbents. Pet. App. 55a-57a. US West called this practice "sham unbundling." *Id.* at 55a-56a.

Although the finished service rule was in effect during the course of the arbitration, US West nevertheless urged the arbitrator to include the above language to prevent MFS from providing basic exchange service entirely through unbundled elements obtained from US West. Pet. App. 55a-57a; *see also* 47 C.F.R. § 51.315(a). US West urged the arbitrator to ignore the FCC's order on the theory that it was *ultra vires* and that the WUTC has independent state authority to reject it. App. 10a-13a; *see also* 47 C.F.R. § 51.315(a), First Report and Order, ¶ 328. The arbitrator rejected this proposed provision, relying primarily on the plain language of 47 U.S.C. § 251(c)(3), and secondarily on 47 C.F.R § 51.315(a). Pet. App. 56a-57a.

At the conclusion of the arbitration, the parties restated their objections to the arbitrator's decision in oral argument before the commissioners of the WUTC. The WUTC approved the agreement, including the negotiated provision requiring US West to combine network elements for MFS. Pet. App. 37a-38a.[9] Because that provision was negotiated, the WUTC's authority to reject it was strictly limited to (1) whether the provision discriminates against a telecommunications carrier not a party to the agreement, or (2) whether the provision is inconsistent with the public

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[9]In its Petition, US West incorrectly states that:

> "[T]he arbitrator imposed a condition consciously modeled on the FCC reconfiguration rules, requiring US WEST 'to perform . . . the functions necessary to combine requested elements in *any* technically feasible manner either with other elements from [US WEST's] network, or with elements possessed by MFS,' whether or not those combinations exist in US WEST's own network." Pet. at 7 (citing Pet. App. 12a n.7).

US West is incorrect in stating that the arbitrator imposed this requirement; US West agreed to it. Neither the arbitrator nor the WUTC imposed any requirement on US West that it combine network elements at the request of MFS pursuant to 47 C.F.R. § 51.315(c)-(f) or any other provision of law.

interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A). US West did not argue that the provision should have been rejected.

2. Federal Court Review of the WUTC's Arbitration Decision

Pursuant to 47 U.S.C. § 252(e)(6), US West challenged the WUTC's decision approving the interconnection agreement in the district court, and disputed a whole host of provisions in the agreement. *See* Pet. App. 27a-30a. While the case was pending before the district court, the Eighth Circuit vacated the FCC's mandatory combination rule and the no separation rule. *See Iowa Utils. Bd.*, 120 F.3d at 813; *see also* 47 C.F.R. § 51.315(b)-(f). Nevertheless, the district court affirmed the WUTC's approval of the provision in the agreement, noting that "the reasoning that led to [the Eighth Circuit's holding] does not apply here." Pet. App. 28a-29a. The district court held that the "Eighth Circuit emphasized that compelled recombination would undermine the difference between wholesale prices finished service and the 'at-cost' price paid for network elements." *Id.* at 29a (citing 120 F.3d at 813). The district court noted that "any unfair cost arbitrage is precluded by use of a recombination fee equal to the difference between cost and the wholesale rate for finished service." Pet. App. 29a. In other words, the district court distinguished between a mandatory rule requiring combination in all cases, which the Eighth Circuit invalidated, and a provision, agreed to in the context of a negotiation, that required the incumbent to combine elements in consideration for payment by the competitor.

US West appealed the district court's decision regarding the combination provision to the Ninth Circuit. While this case was pending before that court, this Court issued its opinion in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In that decision, this Court overturned the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b). 525

U.S. at 393-95. Relying on this Court's interpretation of 47 U.S.C. § 251(c)(3) as set forth in *Iowa Utilities Board*, the Ninth Circuit affirmed the combination provision negotiated by US West and MFS. *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1121 (9th Cir. 1999); Pet. App. 12a-14a. However, the Ninth Circuit articulated its rationale differently than the district court. With this Court's reinstatement of the no separation rule in mind, the court upheld the provision in the agreement requiring US West to combine network elements as being consistent with the 1996 Act.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between the Courts of Appeals Regarding the Applicability of the Hobbs Act to the FCC's Local Competition Rules

US West urges this Court to grant its Petition because, it alleges, the Ninth Circuit acted in effect to review an FCC rule, 47 C.F.R. § 51.315(c)-(f), the validity of which has been and currently is under review by the Eighth Circuit and, therefore, the Ninth Circuit's action was in violation of the Hobbs Act, which confers exclusive jurisdiction upon the Eighth Circuit for review of that rule. Pet. at 9-16.

The focus of US West's argument is that there is a conflict between the decision of the Ninth Circuit in this case and the decision of the Fourth Circuit in *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999). Pet. at 14-15. However, there is no conflict.

The Fourth Circuit in *GTE South* and the Ninth Circuit below both interpreted the Hobbs Act in the same way. In *GTE South*, GTE (an incumbent provider) directly asked the Fourth Circuit to declare that binding FCC rules violate the 1996 Act.[10] The Fourth Circuit refused to

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[10]GTE was a party in an arbitration before the Virginia State Corporation Commission ("SCC") pursuant to the Act. The SCC had established prices for interconnection, unbundled network elements, and wholesale services.

invalidate the FCC's pricing rules because the Eighth Circuit was reviewing the rules pursuant to the Hobbs Act. *GTE South*, 199 F.3d at 743. In fact, the Fourth Circuit cited the Ninth Circuit's decision in this case in support of its refusal to review binding FCC rules. *Id.* (*citing US West Communications, Inc.*, 193 F.3d at 1122-23 (9th Cir. 1999)). The Ninth Circuit ruled it could not review FCC rules or orders in response to US West attacks on the FCC's rules requiring telephone number portability,[11] and the FCC's order regarding reciprocal compensation for telephone traffic bound for internet service providers ("ISPs").[12] 193 F.3d 1120-21, 1122-23; Pet. App. 10a-12a, 15a-18a. US West urged the Ninth Circuit to overturn the interim number portability provisions in the US West/MFS agreement. 193 F.3d at 1120-21; Pet. App. 10a-11a. Like the Fourth Circuit, the Ninth Circuit refused to allow US West to circumvent the Hobbs Act's mandate that challenges to FCC orders must be brought before the circuit courts. *Id.* (citing 28 U.S.C. §§ 2342, 2344). The Ninth Circuit also refused to accept US West's challenge to the FCC's order regarding ISP-bound traffic because that order can be reviewed only in accordance

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By the time the SCC arbitrated the matter, the FCC's pricing rules had been stayed by the Eighth Circuit. *GTE South*, 199 F.3d at 738. Relying on the pricing standards set forth in 47 U.S.C. §§ 251 and 252, the SCC established the prices. *Id.* The prices also largely conformed to the FCC's pricing rules, which were stayed and then vacated by the Eighth Circuit. *See GTE South*, 199 F.3d at 738-40; *see also* 47 C.F.R. §§ 51.501-611. GTE appealed the SCC's decision pursuant to 47 U.S.C. § 252(e)(6). The district court found that the pricing methodology used by the SCC complied with the Act and affirmed the decision. *GTE South*, 199 F.3d at 739 (citing *GTE South, Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998)). GTE appealed that decision to the Fourth Circuit. *Id.* In the meantime, this Court overruled the Eighth Circuit's decision to vacate the FCC's pricing rules on jurisdictional grounds. *Id.*

[11] *In Re Telephone Number Portability*, 11 FCC Rcd. 8352 (July 2, 1996).

[12] *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689 (Feb. 26, 1999) ("ISP order").

with the Hobbs Act. 193 F.3d at 1122 (citing 28 U.S.C. § 2342).[13]

Indeed, the Hobbs Act is not implied at all. Contrary to the argument of US West, the Ninth Circuit did not engage in judicial review of the FCC's mandatory combination rule set forth at 47 C.F.R. § 51.315(c)-(f). By operation of the Hobbs Act, only the Eighth Circuit has jurisdiction "to enjoin, set aside, suspend . . . or to determine the validity of" that rule. 28 U.S.C. § 2342. However, the Ninth Circuit purported to do none of those. In fact, the Ninth Circuit's decision is premised on the fact that Rules 315(c)-(f) are invalid. The invalidation of Rules 315(c)-(f) simply left no rule in place requiring incumbent carriers to combine elements. Because there was no FCC requirement that combination is the rule in all cases, the question then became did the 1996 Act, in the absence of any rule, prohibit state commissions from approving interconnection agreements containing a *negotiated* provision that required an incumbent to combine elements for a fee. The Ninth Circuit held that it did not. Because the FCC's combination rules were not before the Ninth Circuit for interpretation or enforcement, that court did not usurp the Eighth Circuit's authority to review the rules.

The cases cited by US West are not on point. All of the cases cited by US West involve facts where the parties sought rulings from courts that would invalidate or vacate binding agency rules or orders – sidestepping Hobbs Act review.[14] The critical distinction between the cases cited by

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[13]The Ninth Circuit noted that US West, and other parties, have filed petitions for direct review of the FCC's ISP order in the D.C. Circuit. 193 F.3d at 1122 n.12.

[14]*See* Pet. at 12-13 (citing *FCC v. ITT World Communications*, 466 U.S. 463, 468 (1984); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-70 (1984); *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 399-400 (9th Cir. 1996); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 801 (1st Cir. 1986); *Yellow Forwarding Co. v. Atlantic Container Line*, 668 F.2d 350, 354 (8th Cir. 1981); *Air Transport Ass'n v. Public*

US West and the instant case is that the Ninth Circuit did not invalidate or vacate a valid FCC rule or order. [15]

In sum, unlike US West's collateral attack on the FCC's number portability rule and ISP order, the Ninth Circuit's decision regarding the combination provision in the agreement does not implicate the Hobbs Act. In reviewing the combination provision, the Ninth Circuit was not interpreting, enforcing, or reviewing binding FCC rules. Rather, the Ninth Circuit interpreted the 1996 Act, as guided by this Court's decision in *Iowa Utilities Board*, and determined that the negotiated combination provision does not violate the Act.

Utils. Comm'n, 833 F.2d 200, 206 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901 (1984), *vacated on other grounds* 476 U.S. 1167 (1986)).

[15]US West also argues that the Ninth Circuit's interpretation of the Hobbs Act conflicts with decisions of several district courts. Pet. at 15, n.7. US West is wrong. In *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 960-61 (W.D. Mo. 1999), the district court said it would be inclined to vacate 47 C.F.R. § 51.317, a binding FCC rule, if it had the authority to do so. The court concluded that it did not have the jurisdiction to overrule a valid FCC regulation. *Id.* at 961. Similarly, the district court in *Michigan Bell Tel. Co. v. Strand*, 26 F. Supp. 2d 993, 999-1000 (W.D. Mich. 1998), held that it could not entertain arguments that would effectively challenge the validity of the FCC's determination that shared transport is a network element that incumbents must provide to competitive companies. The Eighth Circuit had affirmed that rule and the district court could not invalidate an FCC rule that the Eighth Circuit had affirmed on Hobbs Act review. *See id.* at 1000. In both cases, the district courts refused to invalidate binding FCC rules, just as the Ninth Circuit had refused to invalidate the FCC's binding number portability and ISP orders.

II. The Ninth Circuit's Decision to Affirm the Combination Provision Negotiated by US West and MFS Will Not Threaten the Primacy and Uniformity of Federal Law. The Combination Provision US West Agreed to Include in the Agreement Does Not Undermine the Telecommunications Act of 1996

As part of its Hobbs Act claim, US West argues that the Ninth Circuit's decision to affirm the combination provision negotiated by US West and MFS will "threaten the primacy and uniformity of federal law under the Telecommunications Act." Pet. at 16. This is wrong for two reasons. First, as stated above, there is no conflict between the courts of appeals.[16] Second, the Ninth Circuit's decision represents exactly what Congress intended when it provided for federal court review over state commission arbitration decisions. *See* 47 U.S.C. § 252(e)(6).

Congress did not structure the Act to provide for review of state commission decisions in a single federal district court. Rather, Congress permitted parties aggrieved by state commission determinations to bring an action in the "appropriate" federal district court. *Id.* Therefore, Congress contemplated that several district courts would review interconnection agreements to determine whether the agreements meet the requirements of Sections 251 and 252 of the Act. *Id.*

While uniformity of federal law is an important consideration, federal district courts are not bound by the decisions issued by other district courts. *See, e.g., Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) (district court is not bound by another district court's

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[16]US West premises this part of its argument on its assumption that "both the state regulator and the federal court are free to *ignore* the vacation of the [mandatory combination] rules by a Hobbs Act court." Pet. at 16. As explained above, neither the WUTC nor the lower courts did any such thing.

decision, or even an opinion by another judge of the same district); *Colby v. J.C. Penney Co., Inc.* 811 F.2d 1119, 1123 (7th Cir. 1987) ("[N]either this court nor the district courts of this circuit give the decisions of other courts of appeals automatic deference; we recognize that, within reason, the parties to cases before us are entitled to our independent judgment."). Congress was well aware that district courts are not bound by the decisions of other courts when it provided for review of state commission decisions in the several federal district courts.

One of the policies behind the Hobbs Act is to ensure that judicial review of federal agency action is conducted by a single circuit court, rather than by many district courts. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906-07 (1984), *vacated on other grounds* 476 U.S. 1167 (1986). However, this policy of uniform judicial review of federal *rules* does not mean that federal courts must blindly adhere to a sister court's interpretation of federal *statutes*. The Ninth Circuit is not bound by the Eighth Circuit's interpretation of the Telecommunications Act of 1996, especially when this Court has called into question the Eighth Circuit's reading of the 1996 Act. *See Iowa Utils. Bd.*, 525 U.S. at 393-95.

Even if the Eighth Circuit, on remand, were to decline to reconsider its earlier decision vacating the FCC's mandatory combination rule, the Ninth Circuit's decision would stand. Such a decision by the Eighth Circuit would simply mean that there is no FCC rule that would require incumbents to combine elements at the request of competitive companies, it would not mean that the combination provision in the interconnection agreement between US West and MFS violates the Act.

US West's argument that the Ninth Circuit's decision upsets uniform federal law is nothing more than an argument that the Ninth Circuit must automatically defer to another

circuit's interpretation of the 1996 Act. That argument is simply wrong and does not warrant review by this Court.

III. The Ninth Circuit Did Not Decide That the *Iowa Utilities Board* Decision Revived the FCC's Combination Rules. Rather, the Ninth Circuit Correctly Decided that the 1996 Act Does Not Preclude an Incumbent Carrier From Combining Network Elements on Behalf of Its Competitors

US West also argues that the Ninth Circuit determined that this Court in *Iowa Utilities Board* revived the FCC's mandatory combination rule. Pet. at 19. The Ninth Circuit did not.

Before the Ninth Circuit, US West alleged that the combination provision in the interconnection agreement violates the Act. In light of this argument, the Ninth Circuit considered whether the combination provision was consistent with US West's duty to:

> "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3).

See also 193 F.3d at 1121; Pet. App. 12a-14a. At the time the Ninth Circuit reviewed the combination provision, the FCC's mandatory combination rule had been vacated by the

Eighth Circuit. *Iowa Utils. Bd.*, 120 F.3d 813. Because of the continued invalidity of the FCC's combination rule, there currently is no binding FCC rule that would require or prohibit US West from combining network elements on behalf of US West. Therefore, the Ninth Circuit's decision was based on its reading of 47 U.S.C. § 251(c)(3), and not based on its reading of a "revived" FCC rule.

US West argues that the Ninth Circuit was wrong when it held that this Court's decision in *Iowa Utilities Board* undermined the Eighth Circuit's rationale for vacating 47 C.F.R. § 51.315(c)-(f). *See* Pet. at 19; 193 F.3d at 1121; Pet. App. 12a-14a. However, the Ninth Circuit's interpretation of 47 U.S.C. § 251(c)(3) is consistent with this Court's interpretation of the statute.

When it reviewed the FCC's combination rules, the Eighth Circuit held that the 1996 Act could not be read to require incumbent companies to provide network elements in combinations, regardless of who did the actual combining.

> "[T]he Commission's rule, 47 C.F.R. § 51.315(b), which prohibits an incumbent LEC from separating network elements it may currently combine, is contrary to [47 U.S.C.] § 251(c)(3) because the rule would permit the new entrant access to the incumbent LEC's network elements on a bundled rather than an unbundled basis." 120 F.3d at 813.

The Eighth Circuit also held that 47 U.S.C. § 251(c)(3) "*unambiguously* indicates that the requesting carriers will combine the network elements themselves." *Iowa Utils. Bd.*, 120 F.3d at 813 (emphasis added). On this basis, the Eighth Circuit vacated FCC Rules 315(c)-(f), and on rehearing vacated Rule 315(b). *Id.* This Court, however, held the opposite.

In *Iowa Utilities Board*, this Court disagreed with the Eighth Circuit and held that 47 U.S.C. § 251(c)(3) was

ambiguous and that the FCC's interpretation of that statute as requiring bundled, rather than unbundled, access to network elements was reasonable. 525 U.S. at 395. Under this Court's interpretation, the 1996 Act "does not say, or even remotely imply, that the elements must be provided only in this fashion and never in combined form." *Id.* at 394. US West argues that this Court's decision reversing the Eighth Circuit's decision to vacate Rule 51.315(b) was limited to its consideration of the discriminatory effects of permitting an incumbent carrier to disconnect previously connected network elements. *See* Pet. at 20-21. As stated above, this Court's interpretation of 47 U.S.C. § 251(c)(3) clearly extends beyond that narrow inquiry.

Rather than adhere to the Eighth Circuit's interpretation of 47 U.S.C. § 251(c)(3), the Ninth Circuit read the statute in light of the Supreme Court's determination that it does not preclude incumbent carriers from agreeing to provide network elements in combined form. 193 F.3d at 1121; Pet. App. 12a-14a.[17] As it should, the Ninth Circuit considered itself bound by this Court's interpretation of the Act.

> "The Supreme Court opinion . . . undermined the Eighth Circuit's rationale for invalidating [47 C.F.R. § 51.315(c)-(f)]. Although the Supreme Court did not directly review Eighth Circuit's invalidation of [47 C.F.R.] § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. *We must follow the Supreme Court's reading of the Act*

[17]Recently, the Ninth Circuit affirmed the WUTC's decision to require US West to combine elements for competitive carriers in the context of an arbitration. *MCI Telecommunications Corp. v. US West Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000). US West's Petition for Rehearing and Petition for Rehearing En Banc in that case was denied on May 8, 2000.

> *despite the Eighth Circuit's invalidation of the nearly identical FCC regulation.*" 193 F.3d at 1121 (emphasis added); Pet. App. 14a.

Accordingly, the Ninth Circuit properly disregarded the Eighth Circuit's interpretation of the Act. *See, e.g., County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) (a Supreme Court decision vacating a judgment of the Court of Appeals deprives that court's opinion of precedential effect). In a later decision, the Ninth Circuit restated this point:

> "The Eighth Circuit's decision to vacate the FCC regulation certainly still stands, and is immune under the Hobbs Act from collateral attack. . . . All this means for the purposes of the present appeal is that the Act does not currently mandate a provision requiring combination. Our task is to determine whether such a provision 'meets the requirements' of the Act, i.e., to decide whether a provision requiring combination violates the Act. The Supreme Court's interpretation of the Act makes it absolutely clear that it does not, and we have already so held." *MCI Telecommunications Corp. v. US West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000) (citations omitted).

In this case, the Ninth Circuit simply interpreted the Act as permitting the interconnection agreement provision in which US West agreed to combine network elements on behalf of MFS. Because the Ninth Circuit correctly interpreted the 1996 Act, this Court should deny the Petition.

IV. The Combination Provision Was Negotiated By US West and MFS. Therefore, Federal Court Review Should Be Minimal

US West glosses over the fact that the combination provision at issue in this case was a negotiated provision, not

one imposed on the parties by the arbitrator.[18] As a negotiated provision, the WUTC had very limited authority to reject it. *See* 47 U.S.C. § 252(e)(2)(A). Likewise, the 1996 Act does not contemplate extensive federal court review of negotiated agreements or provisions.

Under the 1996 Act, parties may seek federal court review of state commission arbitration decisions. "In any case in which a State commission makes a *determination* under this section [47 U.S.C. § 252], any party aggrieved by such *determination* may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section." 47 U.S.C. § 252(e)(6) (emphasis added). By providing for federal court review of state commission determinations, Congress intended that the federal courts review arbitrated provisions, not negotiated provisions, for consistency with 47 U.S.C. §§ 251 and 252.

This intent is also evidenced by the language Congress chose to establish the two levels of review of arbitrated agreements and provisions. In defining the inquiry federal courts must make in reviewing state commission determinations, Congress chose language that is nearly identical to the language that defines the inquiry state commissions must use in considering whether to reject arbitrated agreements or provisions. *Compare* 47 U.S.C. § 252(e)(6) *with* 47 U.S.C. § 252(e)(2)(B).

The WUTC was authorized to reject the combination provision only if it discriminated against another carrier not a party to the agreement or if it was not consistent with the public interest, convenience, and necessity. *See* 47 U.S.C. § 252(e)(2)(A).[19] Therefore, the federal court had the

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[18]The district court alluded to the fact that the combination provision was negotiated when it held that the Eighth Circuit was concerned with "compelled recombination." Pet. App. 29a.

[19]In fact, state commissions may approve negotiated agreements or provisions that do not conform to the FCC rules or 47 U.S.C. §§ 251 and 252, so

authority to overturn this provision only if it determined that the WUTC was arbitrary and capricious in failing to determine that the provision was not in the public interest. *See* 193 F.3d at 1117 (establishing the arbitrary and capricious standard as the standard of review for the discretionary decisions of state commissions); Pet. App. 5a.

Congress contemplated that incumbents and competitors would agree on the terms and conditions for competitive access to the incumbent's network. *See* 47 U.S.C. §§ 251(c)(1), 252(a), (b). Like the state commissions, the federal courts should not be in a position to second guess the agreements or provisions that are negotiated between incumbents and competitors regarding access to the incumbent's network. This fact provides a fundamental reason for denying US West's Petition.

V. There Are Other Grounds for Affirming the Ninth Circuit and Denying the Petition

There are at least three additional grounds for denying this Petition.

First, even assuming the invalidity of the FCC's mandatory combination rule, the Ninth Circuit's decision may be affirmed on the rationale of the district court. That court upheld the provision by distinguishing the Eighth Circuit's decision, which the district court viewed as simply holding that the FCC rule requiring combination in all cases went beyond the scope of the 1996 Act. Pet. App. 28a-29a. The district court recognized that the only significant difference between access to unbundled network elements and access to retail or finished services is in how they are priced. *Id.* at 29a. The Eighth Circuit was concerned with pricing distinctions and did not hold that the Act prohibits state commissions from approving agreements that contain a provision whereby the incumbent agrees to combine

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long as the agreement or provision does not result in discrimination against another carrier or violate the public interest, convenience, and necessity.

elements for a fee. In effect, US West here seeks to turn a court ruling that invalidates a rule requiring combination in all cases to a statutory requirement forbidding any incumbent from combining elements for a fee. The 1996 Act cannot be so read. Such a reading would be inconsistent with this Court's decision in *Iowa Utilities Board* and would unduly burden the discretionary authority of state commissions under the 1996 Act.

Second, the arbitration may be affirmed on the basis that the combination provision may be imposed as a matter of state law. The 1996 Act contemplates that state commissions may impose requirements that are a function of state law in their review and approval of interconnection agreements. *See* 47 U.S.C. § 251(d)(3) (state commissions may establish access and interconnection obligations of telecommunications companies that are consistent with the requirements of Section 251 and do not substantially prevent the implementation of Section 251 and the purposes of the Act); 47 U.S.C. § 252(e)(3) (state commissions may establish or enforce state law requirements when reviewing interconnection agreements). A state commission's decision to order an incumbent to combine network elements for a competitor would not be preempted by the 1996 Act because it would not conflict with the pro-competitive policies of the Act or any of its provisions. *See English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). In addition, by granting states the authority to apply and enforce state law in their approval of agreements, Congress clearly did not preempt the field of local telecommunications regulation. *Id.* at 79.

In other cases, the WUTC has imposed a combination requirement on incumbent companies as a matter of state law in the course of an arbitration.[20] While the arbitrator in this

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[20] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. Section 252*, WUTC Docket No. UT-960307, 1998 WL 223213 (WUTC March 16, 1998).

case did not impose a combination requirement on US West (US West agreed to it), the fact that state commissions may impose such a requirement under state law is a basis for this Court to deny the Petition.

Third, to the extent US West is unsatisfied with the mandatory combination provision in the agreement, it need not resort to this Court. US West may renegotiate its agreement with MFS at any time. The agreement took effect on January 8, 1997, and was to remain in effect for a period of two and one-half years, and thereafter until the parties reached a new agreement. App. 3a. The parties were to commence negotiations on a new agreement within two years of the effective date of the agreement. *Id.* If US West is displeased with a term that it agreed to in the past, it should renegotiate the agreement rather than ask this Court to undo it.

CONCLUSION

For the foregoing reasons, we request that this Court deny US West's Petition for a Writ of Certiorari.

June 2, 2000

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APPENDIX

APPENDIX A

MFS INTELENET, INC.

AND

U S WEST COMMUNICATIONS, INC.

ARBITRATED INTERCONNECTION AGREEMENT

FOR THE STATE OF WASHINGTON

XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC Agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches, 3) interoffice transmission facilities, 4) network interface devices, 5) signaling and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

2. (deleted)[9]

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a

[9]The proposed USWC paragraph has been deleted pursuant to the Arbitrator's Decision in Docket UT-960323.

particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

. . . .

XXXIV. MISCELLANEOUS TERMS

A. General Provisions

. . . .

V. Term of Agreement

This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and

effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotations on a new agreement no later than two years after this Agreement becomes effective.

. . . .

APPENDIX B

[Filed 10-2-96]

OCTOBER 2, 1996

JOINT POSITION STATEMENT OF

MFS INTELENET, INC.

AND

U S WEST COMMUNICATIONS, INC.

ON NEGOTIATED TERMS
TO BE INCLUDED IN AN
ARBITRATED INTERCONNECTION
AGREEMENT

FOR THE STATE OF WASHINGTON

MFS Intelenet, Inc. ("MFS") and U S WEST Communications, Inc. ("USWC") have reached agreement on a substantial number of issues. The following draft agreement represents those areas of agreement between the parties. In those areas where no agreement has been reached, the draft Agreement provides language that describes the USWC and MFS positions on the disputed issues. Such language is identified by bold characters with a shaded background. The areas where no agreement has been reached shall be resolved through the ongoing arbitration proceedings.

Dated: October 2, 1996

_____ _____

Counsel for USWC Counsel for MFS

XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches, 3) interoffice transmission facilities, 4) network interface devices, 5) signing and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

USWC Proposed Paragraph:

2. This Agreement provides for the provision of unbundled loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to provide a finished retail service. USWC will

not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.

MFS opposes the inclusion of the above paragraph in this Agreement

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine

network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

. . . .

APPENDIX C

[Filed 10-8-96]

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the matter of	)	
	)	
MFS COMMUNICATONS COMPANY, INC.'s	)	DOCKET NO.
	)	UT-960323
Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S WEST Communications, Inc.	)	

U S WEST'S POST-ARBITRATION BRIEF

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INTRODUCTION

This Arbitration between U S WEST Communications, Inc. ("U S WEST") and MFS Communications Company, Inc. ("MFS") pursuant to the 1996 Federal Telecommunications Act ("the Act") represents far more than a simple arbitration of a dispute between two private parties. As issue is whether contractual terms and prices can be adopted which facilitate telecommunications competition in this state while also allowing for the continued attraction of private capital for constructing and maintaining the telecommunications infrastructure which serves all customers and all telecommunications providers in Washington.

The parties have worked diligently, even during the course of the arbitration proceedings, to reach a mutually satisfactory agreement on complex matters. The agreement is well over 100 pages long, including attachments and appendices, and resolves many of the issues between the parties. The agreement falls short, however, in several significant respects of being a complete agreement between the parties. In each case where a dispute remains for resolution by the arbitrator, the agreement has the proposed language or position of each party, allowing the arbitrator to simply decide each issue and conclude with a complete agreement.

Thus, the Arbitrator is left to resolve six issues.[1] First, the Arbitrator must determine what rate to set for

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[1]MFS' allegations of bad faith, made in its petition and raised again in Mr. Artman's testimony, are without merit. MFS appears to allege bad faith on three bases: that U S WEST asked MFS to sign a nondisclosure agreement; that U S WEST did not produce aprice list when MFS demanded one during negotiations and, apparently, that non agreement has yet been reached. With regard to the nondisclosure agreement, U S WEST addressed this issue in its response to MFS' petition, filed July 19, 1996. U S WEST believes that its response fully addresses this issue, and simply re-emphasizes ther that negotiations were

unbundled loops and whether the Arbitrator should establish geographically deaveraged prices for such loops. Second, the Arbitrator must determine what services may be purchased from U S WEST at wholesale prices and resold by MFS and the wholesale prices for such services. Third, the Arbitrator must determine whether to adopt the erroneous interpretation of the Act put forward in the FCC Orders and permit sham unbundling which will significantly erode the development of facilities-based competition and undercut the role of legitimate resale. Fourth, the Arbitrator must determine the levels of reciprocal compensation paid by U S WEST and MFS. The issue to be resolved is whether MFS should be permitted to charge tandem rates for use of its non-tendem switch. Fifth, the Arbitrator must decide whether U S WEST will be permitted to charge MFS cash in advance for special construction for any facilities U S WEST must construct

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never conditioned upon the execution of such an agreement. With regard to the price list issue, U S WEST responds that a price list was provided to MFS as soon as one was developed which reflected prices in accordance with the FCC methodology. There is no evidence of bad faith here, particularly since the parties were negotiating during this time. Mr. Artman exprssed frustraion at the negotiating process, suggesting that the parties' failure to reach an agreement on all issues somehow evidences bad faith by U S WEST. This is absurd. Of course, the parties did not reach an agreement – that is why this arbitration is taking place. Nonetheless, the parties have agreed on many, many terms, and failure to agree on all terms is not evidnece of bad faith. Finally, there seems to be some suggestion by MFS that simply because MFS is not interconnection and operating in Washington, this evidences bad faith. Of course, nothing could be further from the truth. Other carriers such as ELI and TCG have been interconnected and operating in Washington for years. MFS was a party to the interconnection proceedings (Docket Nos. UT-941464, et al.) and MFS chose, as a tactical matter, to wait to request interconnection until after the Act was signed, and to seek a negotiated/arbitrated agreement. This was clearly MFS' choice, but not its only choice. MFS could have, like other carriers in Washington, interconnected with U S WEST years ago.

specifically to serve MFS. Lastly, the Arbitrator must decide two issues associated with the provision of interim number portability. These are the issues of cost recovery and the treatment of switched access charges.

Before discussing these key issues and any of the other unresolved issues, U S WEST will address MFS' argument that the Arbitrator must follow the FCC Order even when provisions of that Order are contrary to the Act, the laws of Washington or the rules of this Commission.

The threashold issue to be addressed in this arbitration is whether the state of Washington is, as a matter of state policy, going to exercise its independent regulatory jurisdiction in interpreting the Federal Act, while also meeting its statutory regulatory duties in this state, or rigidly adhere to the FCC's *ultra vires* interpretation of the Act.[2] The issues in this case must be addressed by the Arbitrator and by the Commission as a matter of state policy consistent with a sovereign state's independent authority to exercise its rights and responsibilities under both federal and state law.

In deed, certain of the FCC's rules, if adopted by the Arbitrator of this Commission and not reversed on appeal, will so damage U S WEST's ability to attract capital that the public switched network in this state will deteriorate irreparably in a very short period of time. Accordingly, U S WEST asks the Arbitrator to rule in the following manner as to the issues before him: (1) The Arbitrator should reject the FCC's proxy prices. The FCC's proxy

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[2]The FCC's order is currently stayed by order of the Eighth Circuit Court of Appeals. Thus, the FCC's Order and Rules have no force and effect. If the stay remains in effect pending appeal, this arbitration may be resolved under the terms of the Act, without regard to the FCC's Order. If the FCC's Order and rules are not stayed pending appeal, this brief discusses how the arbitrator and Commission should proceed.

prices do not leave U S WEST with a viable business plan. Instead, the FCC's proxy prices are a prescription for arbitrage of artificial rate differences masquerading as competition. Unlike true facilities-based competition, this arbitrage will create no new services, o true customer choice, no new investment, no new jobs (other than telemarketing jobs) – in short it will create none of the public benefits intended by Congress in passing the Act; (2) The Arbitrator should not allow new entrants to obtain services or unbundled elements below cost. If MFS is granted the ability to obtain services or unbundled network elements below cost, all other providers will have that ability; (3) The Arbitrator should prohibit sham unbundling. If MFS is allowed to arbitrage cost/price relationships in U S WEST's current rate structure through "sham unbundling" – without allowing for retail rebalancing and deaveraging, such that it is allowed to pocket subsidies which have heretofore gone to support residential and rural service – then all competitors will have that right. Ultimately, if all competitors are able to ride on U S WEST's network at below cost rates and arbitrage U S WEST's current price structure, then not only will U S WEST not be able to attract investment capital to invest in Washington's telecommunications infrastructure, neither will facilities-based new entrants. The Commission should not so readily ignore the obvious implications of the FCC's orders.

If adherence to the FCC's order accelerates massive retail price rebalancing and retail deaveraging or if it has a catastrophic effect on network investment in this state, then this Commission, not the FCC, will be left to deal with the consequences.

I. The Arbitrator Should Not Follow The FCC Orders Where The Orders Are Contrary To The Act Or Usurp The Jurisdiction Of This Commission

Fundamental to our system of justice is the notion that no one has an obligation to comply with an unlawful regulation or statute.[3] An arbitrator who believes that provisions of the FCC Orders are unlawful, either as contrary to the Act or in excess of the FCC's jurisdiction, may ignore them on the ground that they are *ultra vires* and instead, adopt rules inconsistent with the FCC Orders but consistent with federal law. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (FCC regulations preempting state depreciation regulations are *ultra vires*).

The language that confers appellate jurisdiction upon federal district courts over the decisions of the state Arbitrator under § 252(e)(6) of the Act confirms this general rule. That section provide that any party aggrieved by the arbitration process may bring an action in federal district court " to determine whether the agreement or statement meets the requirements of *section 251 and this section*." (emphasis added.) This provision on its face clearly requires the federal courts to determine *not* whether the arbitrator's decision is in harmony with the FCC rules, but whether it abides by the Act.

It is clear, therefore, based on the appellate standard contained in the Act, that the Arbitrator is required to resolve issues in these arbitrations in compliance with the Act. If the Arbitrator concludes that provisions of the FCC Orders are inconsistent with the Act or exceed the jurisdiction of the FCC and constitute an impermissible infringement on the

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[3]This is in marked contrast to the obligation to abide by an unlawful injunction. *See e.g., Walker v. City of Birmingham*, 388 U.S. 307 (1967).

authority of the Commission over intrastate matters, the Arbitrator may adopt the contractual provision that best meets the requirements of the Act or that best vindicates the policies of this State with respect to intrastate telecommunications issues. The Arbitrator's obligation is one of fidelity to the Act and not to the FCC Order.

Finally, the Arbitrator has an obligation to protect the public interest. Absent clear federal preemption, if what U S WEST is requesting is consistent with the Federal Act, and not contrary to state law, the Commission can consider and rule on the issues. MFS' sole rationale for its stated position in many instances is that the FCC rules require a certain result. If the FCC rule supporting MFS' position is unlawful, then MFS has no valid rationale for its position. And if a rule relied on by MFS is not unlawful, but rather subject to interpretation, in interpreting the rule, the Arbitrator should reject MFS' position and should adopt U S WEST's position if U S WEST's position is consistent with the public policy interests of Washington.

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